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COMPETITION AND TRADE

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FOREWORD

This document contains a summary of the discussions conducted in an informal Ad Hoc Expert Group on Competition Policy and Trade, convened on 14 to 15 December 1993 by the Secretary-General of UNCTAD. The experts comprising the Group who were present in their personal capacity are listed in annex I. Two international organizations, the OECD and the World Bank, also participated in the discussions. One of the documents which constituted a basis for the discussions was a consultant report entitled "The Impact of Competition Policy in Trade Policy" prepared for UNCTAD by a well-known expert in this field, Mr. Rodney de C. Grey. This report is annexed (annex II).

SUMMARY OF DISCUSSIONS OF THE AD HOC EXPERT GROUP ON COMPETITION POLICY AND TRADE

INTRODUCTION

1. The Expert Group was organized to assist the secretariat in identifying possible approaches to ensure that the international trading system of tomorrow embodies universally agreed principles of competition and takes into account the interests of developing countries. The list of participants in the discussions on 14 and 15 December 1993 is annexed (annex I). Meeting just as the Uruguay Round Agreement was concluded, the experts had been invited to make proposals to ensure that the post-Uruguay Round trading system would not open the door to restrictive business practices by enterprises, and that governmental trade actions would conform with competition principles, bearing in mind the universal trend towards liberalization and the adoption of competition policies by a rapidly growing number of countries. The discussions were based on two papers, namely the "Draft International Antitrust Code: A proposed GATT-MTO-Plurilateral Trade Agreement", prepared by an autonomous "international antitrust code working group" as an academic exercise, and a draft paper prepared for the secretariat by a consultant, Mr. Rodney de C. Grey, entitled "The Impact of Competition Policy in Trade Policy" (see annex II). A fruitful exchange of views took place during the discussions, the main points of which are summarized below.

DRAFT INTERNATIONAL ANTITRUST CODE (DIAC)

2. The Draft International Antitrust Code (DIAC) was presented by Messrs. Fikentscher and Drexl. They explained that the DIAC was based on five legal principles: (a) exclusive application to transborder cases; (b) the application of national law in individual cases by national authorities; (c) national treatment; (d) minimum protection; and (e) international procedural initiative. According to the principle of national treatment, national and international competition would have to be treated alike. The DIAC would not advocate a conflict-of-law approach, nor total harmonization of national laws, but rather minimum standards of antitrust enforcement that would be recognized worldwide. It was national law that would be applied by national authorities even to transborder cases. National law, however, would require respect for the minimum standard in cases where the DIAC applied. An international antitrust authority would be accorded procedural rights before national authorities under national law (standing) so as to ensure effective enforcement of the DIAC. This principle of international procedural initiative would be complemented by a system of international dispute resolution. The minimum standards of the DIAC would deal with horizontal and vertical restraints using a per se and rule-of-reason approach, respectively, in different groups of cases. DIAC would deal with the intersection of antitrust and intellectual property, providing for merger control and control of dominant position. In applying the law to transborder cases, States would have to take into account effects on competition in foreign countries. Export cartels would not be exempted from the cartel prohibition. The working group which had elaborated the DIAC was of the opinion that all States depended on access to foreign markets. A minority of the working group would have preferred 15 basic competition principles of international antitrust law, which are included in the introduction to the DIAC, over the rather detailed provisions of the DIAC itself.

3. In the discussions on the DIAC, some participants questioned what would be obtained from having international competition standards or from linking a code on RBPs to the MTO system as most RBPs could be dealt with through national or bilateral action. A dispute settlement system would not improve world competition, since there would be no global investigation authority, and because governmental actions or compulsion would lead to exemption; it would instead have to address tensions among States regarding extra-territorial enforcement. Other participants considered international standards necessary because of the risk of discrimination among enterprises if all countries had not adopted competition laws and because of market access issues. Still other participants considered that the adoption of the DIAC was not a priority because the main restraints on global competition were the way in which trade policies were applied by Governments. It was also pointed out that private parties should not be allowed to restrict competition, in addition to restrictive government actions, nor to go against government endeavours to liberalize trade. Some participants emphasized the need for the DIAC to allow for differential treatment in the competitive situations among countries, and for differences in competition policy objectives. The problem of ensuring consistent treatment of different types of RBPs or government actions was also highlighted, along with the uncertainties regarding the form of market structure which would be optimal for both competition and efficiency. The need for a "rule of reason" treatment of practices was emphasized, particularly in respect of vertical restraints, since exclusivity arrangements could help market access. Some scepticism was expressed as to how easy it would be to enforce a DIAC in practice, given lobbying of Governments by firms; a gradual and incremental approach was considered appropriate. The fact that there was little clear popular awareness of, or interest in, competition was emphasized; the resulting lack of political pressure would hamper the adoption of global rules. In this connection, pedagogical measures were necessary in order to create a "constituency" for competition, although competition issues were also a question of States' interests in the bargaining context of trade negotiations.

Competition in the trading system

4. The consultant, Mr. Grey, then introduced his paper on how competition principles and criteria could, through minimal changes or interpretation of existing texts of the GATT or its associated codes, be used to mitigate the protectionist and anti-competitive bias of trade laws as currently applied in the areas of anti-subsidy, countervailing duties, anti-dumping (including price undertakings made to settle anti-dumping proceedings) and voluntary export restraints. He argued that this could be done, for example, by raising the thresholds necessary for import penetration, degree of material injury, causality and triggering of trade action, and by taking into account consumer welfare effects. Such modifications to trade laws were necessary because a liberal trade policy was a strong safeguard of competition, particularly in small economies; priority should therefore be given to this rather than to elaborating global antitrust rules.

5. In the discussions that followed, there was a general consensus that anti-dumping criteria and procedures were often applied in a manner that was anti-competitive and irrational. Alternative regimes that applied in such cases were those relating to discriminatory pricing, predatory pricing or unfair competition, which would not intervene in most cases where dumping was

currently found. Several participants suggested that the anti-dumping regime was so entrenched that it could realistically be modified only through small incremental technical changes, as had been suggested by Mr. Grey. Other participants favoured a more ambitious attempt to change the system and focus on the overriding theme of market access. Still other participants considered it unrealistic to attempt to change trade policies, and suggested that instead the focus should be on reaching agreement on basic principles regarding RBPs affecting trade, such as the following:

(a) Prohibition of private restraints on trade;

(b) The duty of Governments to regulate their economies could not be delegated;

(c) Trade restraints should not be secret.

Another participant proposed the principle that competition was the basis of a market economy.

6. Points made during the discussions on the relationship between trade and competition policies included the following:

(a) Industrial and trade policies should be subordinated to competition policies;

(b) Competition authorities should have the standing to act as advocates for competition, in a transparent setting, and should have some independence from political pressures;

(c) The question of how far an agreement on competition and trade should cover State actions needed to be resolved;

(d) While some participants considered that, in smaller economies, liberal trade policy could be the principal weapon for competition policy, others suggested that trade policy could never handle all the problems that could be dealt with by competition policy, particularly in the service sector (and including "hidden dumping" by transnationals through transfer pricing abuses);

(e) It was easy to assemble political opposition to anti-dumping for consumer goods, while it was not so easy in respect of intermediate inputs.

Further work

7. Suggestions made by one or more participants as to the work that might be done in this area by UNCTAD included:

(a) Continuing provision of information and technical assistance to developing and other countries so as to enable them to adopt or better implement competition policies and to prepare for international negotiations in this area;

(b) Submission of the consultant's report (annex II) to the Intergovernmental Expert Group on Restrictive Business Practices;

(c) Survey of bilateral cooperation agreements concluded in this area, including the "affirmative comity" solutions adopted in the US/EEC Commission agreement;

(d) Survey of how disputes relating to restraint of trade have been dealt with;

(e) Elaboration of rules to resolve conflicts relating to extra-territoriality, including enforcement problems;

(f) A look at possible antitrust violations involving private trade arrangements;

(g) A look at the objectives of competition policies as applied in various countries and the rationale for the granting of exemptions in some sectors, for public enterprises, for some types of practices or for intellectual property rights (particularly copyright) in importing and exporting countries in different sectors, for example textiles;

(h) Examination of the use of competition policies to further trade goals;

(i) Examination of the extent to which existing trade principles conform to the Set of Principles and Rules;

(j) Provision of information on the anti-competitive impact of trade measures and how trade policy could be used instead as an instrument for competition;

(k) Advocacy of more transparency relating to the costs to society of economic decisions affecting competition;

(l) Advocacy of liberalization of trade and other economic policies;

(m) Advocacy of greater compatibility between trade and competition policies, including by reducing the scope of anti-dumping actions to cover only activities contrary to antitrust or unfair competition laws, and by action against export cartels and exclusionary behaviour in domestic markets;

(n) A look at how competition policy can be made part of development policies;

(o) Articulation of a set of basic competition principles;

(p) Proposals for an international setting for competition rules modelled on the Set and the DIAC;

(q) Further examination of the impact of trade restrictions on competition, including effects on prices and industry structures in various markets and the relationships between trade and price disparities.

ANNEX I

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(Geneva, 14-15 December 1993)

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ANNEX II

THE IMPACT OF COMPETITION POLICY IN TRADE POLICY

Report prepared for UNCTAD

by

Rodney de C. Grey

Note: The views expressed in this report are those of the author and do not necessarily represent the views of the UNCTAD secretariat. The designations used and the presentation of material do not imply the expression of any opinion whatsoever by the United Nations Secretariat concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

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Introduction

1. The purpose of this paper is to examine first the extent to which trade policy, as practised, conflicts with the objectives of competition policy and secondly how this contradiction between trade policy and competition policy can be dealt with by changes in trade policy rules and perhaps by competition policy practices; finally, it examines what probable implications such a policy convergence would have for developing countries.

2. These issues are not yet on the agenda of trade negotiations, but there have been several recent statements made arguing that they must be addressed in a multilateral negotiation after the Uruguay Round, at the same time as the issues of differing rules on protecting the environment and differing labour standards. Three different expositions of such proposals will be examined briefly. The first is the view put forward by Sir Leon Brittan, of the European Commission, and elaborated, in July 1993, by the circulation of a "Draft International Antitrust Code" prepared by a group of antitrust lawyers. The second source consists of the various criticisms of trade policy articulated from a competition policy viewpoint by senior members of United States and Canadian antitrust and trade bars - most recently, with reference to remedies against "unfair trade" in the context of the Canada/United States Free Trade Agreement (CUSTA), and now the trilateral agreement involving those two countries and Mexico (NAFTA). A number of economists have drawn attention to the costs (to consumers) of agreements to restrain trade quantitatively as well as the cartelization impact. The third source of such proposals is the detailed examination of certain aspects of these issues within the Organization for Economic Cooperation and Development (OECD) under the aegis of the Committee on Competition Law and Policy. It will be useful to review these three related developments of expert and informed opinion.

A. EC views

3. A forceful demand that certain of these issues be on the next round of multilateral negotiations was heard in the statement by Sir Leon Brittan (then EC Commissioner for competition policy, now Commissioner responsible for trade policy) at the World Economic Forum, at Davos, in February 1992 1/ who proposed that:

> "There is now a real need to develop international competition rules and enforcement mechanisms ... *Rules of competition law should take some of the strain from a sole reliance on trade law at the international level.*" [Emphasis added] "Anti-dumping duties are a necessary safeguard to deal with unfair trading practices - but they are an expediency to deal with market *failure*, and they are a dangerous expediency ... Even where they are correctly and reasonably applied, such measures can be a double-edged sword, harming the market which applies them as well as the exporting companies against which they are applied ... What we need is a coherent and clear set of [competition policy] rules agreed internationally with a proper enforcement system, to be accompanied by national laws following the same general objectives ..." Noting, briefly, that GATT provisions on subsidies should be reinforced, Sir Leon suggested that consideration should be given to "a clear agreement as to the rules relating to cartels, distinguishing between acceptable industrial cooperation and

> unacceptable restrictive practices along the lines already developed by all major systems of competition law." He added, "Let us try to develop a core of common rules on the appraisal of mergers."

This will necessarily involve creating forums or mechanisms to address conflicts of jurisdiction. Finally there must be some agreed rules about the anti-competitive activities of public monopolies.

4. This is an imposing agenda - yet it may result in no more than might by now have developed, incrementally, had the Havana Charter been accepted. Chapter V of that charter had included some substantial, albeit initial, proposals regarding international cooperation on dealing with restrictive business practices. 2/ Sir Leon did not discuss how the application of anti-dumping measures might have major anti-competitive effects; he did suggest that an international agreement on competition policy, and its application, would lessen the need for recourse to anti-dumping measures. In urging that GATT should continue to be the major forum for dealing with the anti-competitive effects of subsidization, he did not draw attention to the fact that GATT provides for effective action (i.e. countervailing measures) with regard to subsidies on imports, but remains ineffective with regard to injurious import-replacement subsidies or subsidies on exports to third markets, and, of course, is silent on subsidies that distort competition within a single market (such as the European Union). Neither did he address the issue that increasing cartelization, in import markets as well as export markets, is implicit in various export limitation arrangements (e.g. "orderly marketing arrangements", "voluntary export restraints") to which the Community (or member States) have been or are a party, e.g. covering textiles, garments, steel, automobiles. 3/ Sir Leon's agenda "for post-Uruguay Round negotiations looking to international contractual rules on competition policy" touches only tangentially on the anti-competitive aspects of trade policy, as now practised. The more detailed proposals set out in the "Draft International Antitrust Code" address only the issue of how, and in what detail, an international agreement on the control of restrictive business practices might be elaborated. It does not address the more interesting, and indeed, more urgent and substantial question of how to curb the anti-competitive excesses of trade policy as now practised.

B. OECD activities

5. Activities within the Organization for Economic Cooperation and Development (OECD) on the competition policy/trade policy frontier also have relevance. Since the early 1980s, the former Committee of Experts on Restrictive Business Practices (and its Working Party No. 1 on Competition and International Trade), now the Committee on Competition Law and Policy (in consultation with the Trade Committee), has been responsible for a substantial programme of research into the extent and implications of the anti-competitive aspects of trade policies. 4/ A number of these research studies have been published. They provide a useful body of commentary on the issues, although, as is not surprising, there are few sharp criticisms of member Governments' policies and few precise proposals for action. 5/ Of the more important published studies, that on Predatory Pricing is of the greatest interest for trade policy, given that it addresses an issue of competition law which is of immediate relevance for anti-dumping policy. OECD work is commented on, briefly, by Geza Feketekuty, of the United States Special Trade

Representatives' Office, in a study published by the Group of Thirty. 6/ Mr. Feketekuty suggests it is "time for a new trade model". He goes on to say that "Other insights may be obtained from an analysis ... of national competition policies and their underlying analytical bases ... Most members of the OECD Trade Committee recognize the need for new approaches to the (trade) rules and there is a growing body of opinion that the focus should be on a competition paradigm." Putting aside the rather obvious question of what precisely is "a competition paradigm" - given the lack of agreement within national communities and internationally on the logic and objectives of competition policy - it is none the less possible that "Competition Policy as a Paradigm for Trade Policy" may suppose a more ambitious negotiating agenda than that proposed by Sir Leon Brittan.

C. Academic and practitioners' analyses

6. Beginning at least 20 years ago, some members of the United States antitrust bar, some members of the trade bar, and competition law administrators and students in Canada, Japan and the European Community have examined the conflict between trade policy (and, in particular, anti-dumping policy) and competition policy. 7/ The key issue of discriminatory pricing under the two systems has been reviewed in considerable detail. In considering this extensive literature, it is important to keep in mind that neither administrators nor legal practitioners are necessarily disinterested - some have administrative turf to defend, others have clients. One may however conclude that it is now the accepted view, with regard to at least two types of trade measures, that current practices may produce significant anti-competitive effects. One is the anti-dumping provisions; the second is the use of "orderly marketing arrangements" and other quantitative limitations on trade.

7. In contrast, little attention has been given to the fact that there is no effective trade policy mechanism to restrain subsidies in larger markets which have the effect of displacing otherwise competitive imports. 8/ However, there appears to be a growing body of opinion that the countervailing duty provisions can be applied in an anti-competitive manner; the proof of this can be found only by a detailed examination of decisions on what constitutes countervailable subsidies and how such subsidies may be calculated. 9/

8. There has been considerable research and investigation into the economic impact of bilateral or multilateral arrangements to limit trade flows quantitatively. Numerous examples exist of the use of such devices, each with its unique features. One important type is found in the many bilateral, product-specific export restraint arrangements negotiated under the umbrella of the Multi-Fibre Arrangement. If these involve export quotas administered by the exporting country, some of the "rent" of the quantitative restraint is collected by the exporters; if the restrictions are administered by the importing country, perhaps by allocating import permits to importers, some of the "rent" may be collected by the importers. The contrast with a tariff regime, in which some of the rent of the restriction, imposed by a pricing measure, is collected by the Government of the importing country, is evident. (The rest of the "rent" will be secured by domestic producers charging tariff-influenced prices; much will depend, obviously, on the extent of competition between domestic firms.) Another category of restrictive arrangement is the limitation on exports (e.g. of vehicles from Japan) by

arrangements administered essentially by the producers. Clearly, producers are enabled to extract higher prices; at the same time, in certain markets, domestic producers are able to obtain higher prices than would be possible in the absence of export restraints. (Automobiles are a particularly important case, not only because of the economic importance of the automobile industry in most industrialized economies, but also because there are substantial variations between the various levels of restriction applied by the Japanese industry to various markets (e.g. about 20 per cent or more of the United States market was taken by imports from Japan whereas in France it was only 3 per cent).

9. These various arrangements for restraining trade on a quantitative basis have been highlighted in order to emphasize that, while in the short term such measures impose costs on importing countries (on users and consumers) and give rise to "rents" which are often collected by exporters, it is broadly agreed that the important long-term effect is to encourage, on the one hand, anti-competitive arrangements, that is to create cartel-like arrangements in exporting countries to administer restrictions, and, on the other hand, to reduce competition in importing markets. Both these anti-competitive effects may impose long-term losses of efficiency. Here trade policy measures are in direct conflict with competition policy. 10/

10. In summary, there is a consensus that the anti-dumping system and the use of quantitative restraints on trade are likely to impose costs on the importing country (although accepted by exporters because they often collect much of the rent). On the international control of subsidies which distort competition, there is less agreement.

11. Given the extent of agreement on how trade policy conflicts with competition policy, it is not necessary to spend time on detailed exposition of the factual situation; this note is therefore prescriptive rather than descriptive. These prescriptions are set out as a series of comments, first, in regard to the trade remedy laws as a system; secondly, there are more specific comments on anti-subsidy measures, anti-dumping measures, and quantitative restrictions on trade. Parallel issues are then briefly considered: Are there aspects of competition policy that create trade policy issues? How do they relate to the interests of developing countries? Here there may be some long-term gains to be set against some short-term losses (i.e. losses of the present rents of restrictions).

I. "TRADE REMEDY" LAWS

12. If it was agreed that it would be desirable to make trade measures more consistent with competition policy, it would be necessary to make a number of changes - essentially elaborations or interpretations of the existing provisions (articles VI and XIX) of the GATT. There are various changes of interpretation which would not require re-writing of GATT articles, but which might move the "unfair trade" provisions and the provisions regarding action against intolerable import levels - the "trade remedy" laws, as a system, in the direction of neutrality, certainly, at least, in so far as the anti-dumping system is concerned, and which might help ensure that the use of these provisions did not have the effect, intended or not, of cartelizing various markets. Let us address these general proposals first, and then consider the three rather different types of protective measures separately.

A. Thresholds

13. An issue of broad importance, across the system, is that of thresholds, the degree of import penetration below which restrictive action should not be taken, the margin of dumping or of subsidization below which no action should be taken, and the minimum impact below which no action should be taken.

14. GATT article VI (anti-dumping and countervailing duty) and GATT article XIX (protection against intolerable increases of imports of particular products) should be interpreted narrowly and strictly - because they are "exceptions" to the general rule of non-discrimination. Restrictive action under these articles should be precluded unless the quantity of imports at issue was significantly more than negligible. Accordingly, the anti-dumping, the countervailing duty and the article XIX provisions should operate only when the quantities involved are relatively substantial. Invoking the trade remedy system necessarily imposes a burden on the country taking the action; it may be anti-competitive in effect. Like other exceptions to the general rules of GATT, articles VI and XIX should not be invoked unless the situation calls unambiguously for intervention. A raising of the threshold of import penetration would help achieve this purpose. The proposal agreed on in the Uruguay Round for "de minimis market share" under the anti-dumping provisions is no higher than applied by some countries, and lower than that now applied by some others; it might therefore, from the point of view of exporting countries, be a retrograde step. 11/

15. The proposals agreed in the Uruguay Round include the notion of a de minimis margin of dumping and a de minimis margin of subsidization, below which action would not be taken. Again, it is not clear that, compared with the current, non-codified practice of various countries, this offers any improvement from the point of view of exporting countries. 12/ Some United States experts have argued that the de minimis dumping margin, for example, should not be 2 per cent of the export price, as now agreed, but 5 per cent. 13/ The proposed de minimis subsidy provision (in article II of the draft subsidies/countervailing code) sets the minimum level of 1 per cent ad valorem. (For developing countries, 2 per cent has been proposed). Again, examination of current practice in countries levying countervailing duties suggests this may be no great advance. Indeed, some United States experts have argued for a 5 per cent de minimis level for domestic subsidies. 14/

B. Degree of injury

16. The question of the degree of injury is a "threshold" issue. Leaving aside the question of "injury to whom or what?" and leaving aside the question of whether "injury" is a "diversion of business" concept or a concept of "injury to competition", the various degrees of injury at issue under the two key GATT articles (VI and XIX) should be more clearly identified. At one extreme is the degree of impact which is "negligible", which does not warrant any intervention, and which is not actionable. This may involve imports above the quantitative threshold level, and dumped or subsidized rather than de minimis levels. Under consideration is not the quantity of imports or the margins of dumping or subsidization, but rather the degree of impact: how much injury? 15/ Further along in the progression there is that degree of adverse impact which is "material", the key word in article VI. Nothing in

the GATT wording or in the history of drafting suggests that "material" begins where "negligible" ends, although such an approach, of course, commends itself to protectionists. In the absence of any GATT (or art. VI Code) provision defining "material", the United States Congress legislated a definition in the Trade Agreements Act of 1979: "in general, the term 'material injury' means harm which is not inconsequential, immaterial or unimportant". 16/ Given that precedents and practices under the two GATT codes tend to become internationalized (that is, given the likelihood of producers seeking definitions, precedents and standards in the practices of other countries), this United States definition is one which has set a "more than de minimis" injury standard.

17. Further along in the progression of adverse impact, there is that degree of impact which is "serious" and which under GATT article XIX may justify the withdrawal of a tariff concession. Implicit in the GATT is that the withdrawal of a negotiated concession, on which investors and Governments elsewhere have based decisions, can be justified only by a degree of impact considerably greater than that which has to be determined to exist to warrant action against "unfair" imports. This implicit logic of the GATT injury provisions should be made explicit by an agreed "interpretation"; this was not expected to transpire during the Uruguay Round.

18. Still further along this progression, and outside the GATT articles, is that degree of adverse impact which, it appears, countries agree justifies restrictive action without the disciplinary feature of GATT article XIX: the obligation on the importing country to act in a non-discriminatory fashion and the right of the exporting country to make compensatory withdrawals. That is the logic of the Multi-Fibre Arrangement; it is also the logic that underlines the set of restraints on trade in automobiles, and that will be the logic of any new restrictive agreement on steel.

19. It is not at all clear that any past and present MFA actions could not have been handled under article XIX of the GATT. However, countries wishing to take restrictive action in this sector have preferred to do so on a discriminatory basis and without having to pay compensation. In accepting the MFA approach, it was implicitly accepted that commercial policy decisions should be made essentially on the basis of power by the ability to coerce. This is just what GATT was intended to limit. 17/

C. The causal link

20. Another systemic issue is the nature of the causal link between the imports at issue and the adverse impact observed. Article VI of the GATT authorizes the use of offsetting duties when dumped or subsidized imports "cause or threaten material injury"; article XIX speaks of imports which "cause or threaten serious injury". This causal link is reflected in domestic law in different jurisdictions in different ways. For article VI measures, the United States interpretation of the causal link is simple and easy to satisfy. The United States test is to determine, first, if the industry at issue is suffering a degree of adverse impact, or injury, which can be held to be material (that is, "not immaterial"); secondly, it must be determined if dumped (or subsidized) imports, because they are dumped or subsidized, are among the various causes of this injury. This logic is usually re-stated in every United States International Trade Commission article VI finding. It

seems to have been assumed in Washington that this interpretation of the GATT provisions on "cause" is consistent with the GATT.

21. An alternative view of the article VI causality is that it requires a determination of that degree of injury solely attributable to the dumped or subsidized imports, to the extent that the dumping or subsidization is material. That the industry may be suffering other adverse effects may be examined but should not be at issue. 18/ This is a much more rigorous test and one more difficult for domestic producers to satisfy than the existing United States interpretation.

22. The causality concept in GATT article XIX is not unlike that of article VI (except that injury in article VI is to an "industry" whereas in article XIX it is to "domestic producers"). In United States law, however, the article XIX concept of cause, which has been reformulated several times, is more onerous, from the point of view of producers seeking protection, than is the concept of cause in the article VI provisions in United States law. It requires that the imports be a "substantial cause" of injury, not merely one among many causes. 19/ A tightening up of the threshold levels as well as agreement on levels of "injury" and on a tougher test of causality might lead to an increase in the use of article XIX cases, and a decrease in the use of article VI measures. It would, of course, be an improvement if there were fewer "grey measures" or "surrogates" for article XIX (that is, measures such as "voluntary export restraints" which deliberately avoid the criteria and conditions of art. XIX), and more overt use of article XIX. Tariff measures provided for under article XIX are less likely to have cartel-creating effects in exporting countries.

D. Introducing competition policy tests

23. A final general issue with regard to GATT articles VI and XIX that should be considered, before going on to detailed issues related to the particular provisions (e.g. anti-dumping measures), is the issue of overtly introducing competition policy considerations or tests into the application of such measures. In a sense, the European Community (EC) had shown the way: in a case before the European Court of Justice, in June 1992, it was held that the institutions of the Community must take into account EC competition rules when determining damage by dumped imports (the Extramet decision). 20/ Prior to this decision, the Commission appeared to give little weight to competition policy rules in making anti-dumping decisions. In one case, it held that the Community producers had been injured, despite the fact that some aspects of their pricing policy had been criticized by the French antitrust authorities. 21/ Leaving aside the question of why, in the Economic Community legal system, it is held to be necessary to take competition rules into account when assessing injury to EC producers under GATT article VI, it is important to note that the wording of the Tokyo Round Anti-dumping Code appears to make it mandatory that domestic authorities, when investigating the impact of dumping, consider "trade restrictive practices of and competition between the foreign and domestic producers ...". 22/ This phrase is drawn from the explanatory footnote to paragraph 4 of article 3 of the Code; that paragraph is cast in mandatory language. Not all countries (e.g. Canada) 23/ have taken all Code provisions into their domestic legislation; accordingly, in domestic law in those countries there may at present be no requirement that the requirements of article 3 of the Code be

considered by the administrative authority. Clearly, here is one step that could be taken to bring competition policy considerations into anti-dumping policy without changing the international rules: all that appears to be required is that the existing GATT Code provisions be properly implemented. (The same reasoning applies in relation to the application of countervailing duty. The Tokyo Round Code on Subsidies and Countervailing Measures incorporates analogous wording and is equally mandatory. 24/)

24. It is not clear, however, whether the wording of the two codes requires domestic administrative authorities to deny the protection of the anti-dumping provisions or the countervailing duty provisions to a domestic producer which is a monopoly, or which is in a dominant position in the domestic market. On this point it would appear that the EC Extramet decision (mentioned above), requiring the EC authorities to take into account EC competition policy rules when assessing injury by dumping, may go beyond the GATT Code requirements. If so, this is a situation where the EC could give some leadership.

25. If it were agreed that, as a general rule, firms in a dominant position, or firms held to be abusing market power, should be denied the protection of GATT article VI provisions, there would be some logic in considering what sort of sanctions should be applied when the import penetration at issue is being carried out by a firm in the exporting country which exercises market dominating power, or, for example, is able to dump exports because it serves a protected domestic market - protected by tariffs, quantitative restrictions, procurement preferences, and the like, enabling it to charge higher prices. At issue is whether the anti-dumping system, in taking competition policy into consideration, should distinguish between price discrimination in an import market by an exporter in a relatively competitive domestic market, and price discrimination by an exporter enjoying a highly protected domestic market or a position of domestic market dominance. One could envisage that remedies more effective (and less cartelizing) than anti-dumping duties, such as "cease and desist" or "exclusion" orders, might be invoked. It is instructive to recall that anti-dumping provisions, when first put forward early in the century, were held to be necessary because of the export practices of protected "trusts or combinations". 25/

26. It would be useful to summarize what is meant by the proposal to bring competition policy considerations into the application of GATT articles VI and XIX measures. There are various ways in which this can be achieved. One is that, in considering the grant of special or "contingent" protection, under the anti-dumping, anti-subsidy, or safeguard (emergency) provision, account should be taken of the competitive structure of the domestic market. Producers which dominate domestic markets may be denied special protection. Secondly, the type of protection to be used and the structure of the measure must be considered in the light of its effects on competition. For example, suppose an anti-dumping action results in a positive determination of dumping causing injury: the levying of an anti-dumping duty (which can be recouped, eventually, by importers to the extent they can show that a particular import transaction was not dumped) gives a tariff-like protection to the domestic industry. In contrast, an "undertaking" by the firms accused of injurious dumping to cease dumping may have the same price effect, but may allow foreign firms to collect the rent of this restriction and to use such funds to increase their market power; it may well have the effect of inducing a cartel-like structure among the exporting firms. 26/ Similarly with action

under GATT article XIX, if the importing country exercises its right to impose a special non-discriminatory tariff, the domestic industry will enjoy additional protection. If, as an alternative, one or more exporting countries agree to limit their exports, much of the rent of that restriction will be secured by exporters, and there will no doubt be cartelizing effects in those countries, with long-term impacts on industrial structure. Who can argue that many Japanese industrial firms have not profited, at least in the short term, by the many export restraint arrangements entered into by the Japanese authorities, or condoned by them? Who can argue that the competing firms in importing countries are not stronger than they might otherwise have been if they had secured only short-term tariff protection rather than long-term export restraints? The European automobile industry, protected for many years by quantitative export limits imposed in Japan, is an obvious case in point. 27/ These matters have been exhaustively examined and documented by the United States Federal Trade Commission, by OECD, and by numerous individual lawyers and economists. The most curious aspect of over 20 years of scholarly research, virtually unanimous in its conclusions as to the cartelizing impact of export restraint arrangements, is its total rejection by trade policy politicians and by administrators.

27. Any close examination will show that there is a complex, shifting relationship between trade policy and competition policy - a relationship that evolves in specific competition and trade policy situations. We have emphasized certain major anti-competitive practices in the trade policy field. Of course there are cases in which trade policy mechanisms have been used by competition policy authorities to achieve competition policy objectives. Interesting examples are likely to be found in the experience of smaller countries, simply because in such countries industrial concentration ratios are likely to be higher than in larger countries and competition policy authorities are likely to give great weight to measures which will avoid raising such concentration ratios. A case in point is a consent decree negotiated by the competition policy authorities in Canada, under which the merger of two producers of large power transformers was made subject to an undertaking that the merged firm would not initiate anti-dumping action against imports for a five-year period. 28/ This is a particularly interesting case because the use of the anti-dumping provisions by Canadian producers of such capital goods has been related to the fact that certain major overseas markets have been closed, protected, procurement markets, where monopoly or oligopoly or subsidized profits may be earned and used to finance exports. 29/

28. Without commenting on the particular case noted above, it is evident that anti-dumping measures have not been an adequate device to ensure "fair trade" in those major items of capital equipment where the largest producers have enjoyed protected procurement markets. Some improvement may be secured by the widening of the GATT Procurement Code; however it is for consideration whether, either in the GATT (under art. XXIII) or under a regime of increased international cooperation in competition policy as called for by Sir Leon Brittan, action could be taken against such abuses of market power. Competition from firms based in protected procurement markets is a major example of "unfair competition" and gives rise to what may be one of the few areas where dumping can be held to be "predatory", in the sense of competition law. (As smaller countries open their procurement markets, they may be faced with such competition problems; one solution would be for smaller countries to

enact their own versions of "Section 301" which the United States would employ against such practices.) In any event, what the brief discussion above may infer is that the mix of competition and trade policy objectives, methods and "weaponry" is likely to be very specific to the particular problem of international competition at issue.

F. Summary: systemic changes

29. The general changes that would be required in the working of the trade remedy or "contingency protection" system, of GATT articles VI and XIX have been enumerated. To sum up, the four such general changes are: (a) raising of the quantitative thresholds; (b) clarification of the degrees of adverse impact on domestic producers at issue under GATT articles VI and XIX; (c) clarification of the logic of causality; (d) introducing competition policy considerations into the use of GATT articles VI and XIX measures. We should now look at the particular and specific problems that would arise in bringing competition policy into a working relationship with trade policy in regard to the anti-subsidy provisions, to specific elements of the anti-dumping provisions, and to GATT article XIX actions.

II. THE LACK OF SYMMETRY IN THE ANTI-SUBSIDIZATION PROVISIONS

30. Certain specific features of the international regime providing for sanctions against injurious subsidization will be considered first. These are, at the multilateral level, embodied in parts of articles VI, XVI and XXIII of the GATT, and expanded in the Tokyo Round Code on Subsidies and Countervailing Measures. 30/ For the purpose of the present discussion, neither arrangements such as the European Free Trade Association (EFTA), nor the Canada/United States of America Free Trade Agreement, nor NAFTA, nor the Andean Pact will be considered. For the purposes of the present discussion, what is interesting, apart from the GATT provisions, is the regime that has developed within the European Community (EC). The international issue is, simply, that there is no international authority, analogous to the European Commission, disciplining and limiting the subsidies paid by its members. Thus the international system relies on procedures, under domestic law, to address injurious effects in import markets of subsidies deemed to have been paid on exports, and relies on the radically different procedures of international consultation to deal with other injurious subsidies.

31. Problems arise, in the main, because there are great differences in market size. In the United States, in the European Union (perhaps in Brazil and, in due course, in Mexico or China) subsidies can be paid to domestic producers of goods and services which will be marketed largely domestically and which may displace otherwise competitive imports. That this might be injurious to the producers in an exporting country is recognized in the GATT Code, and can be the basis for consultation and for authorized countermeasures. 31/ But as experience has shown, since the Code was negotiated in 1979, these so-called "Track II" measures are not effective.

32. Countervailing duties, when applied by a major market power to imports from a smaller economy, can have a significant impact on the exporting firms concerned. Given the important economies-of-scale prevailing in most manufacturing sectors, many smaller economies do not have domestic markets large enough to absorb the bulk of production of a given product from an

optimum-sized plant, an important part of the plant's production must thus be exported; otherwise it must operate at less than optimum capacity (and thus may require protection from imports to make a normal profit). However, its exports may be liable to countervailing duty if they are held to be subsidized (under the domestic administrative procedures of the importing country). The same plant, receiving the same level of subsidies, if constructed in the larger market, will not, of course, be liable for countervailing duties on its sales in that market, and countervailing duties on its limited exports to the smaller market will be no real economic threat, only an irritant. This lack of symmetry in the working of countervailing duties, combined with the ineffectiveness of the "Track II" system of the GATT Code, is a problem not only in terms of trade policy but also of competition policy.

33. A variety of steps may be taken, in a longer perspective, to deal with this set of issues. One would be to introduce rules about competition-distorting subsidization, including subsidies to import replacement (including, of course, subsidies by sub-national units of government and those paid through the tax system as well as by expenditure mechanisms), into the system of international competition rules, as envisaged by Sir Leon Brittan. This would be a major extension of his "agenda". Another step would be to make a concerted effort, under the GATT Code, to police competition-distorting subsidies. However, the GATT arrangements work essentially on a complaint and consultation basis, relying on advisory panels. Recent experience has demonstrated that the major trading countries are willing to block the acceptance of GATT and Code panel reports and are not quick to implement recommended changes. 32/ It is unrealistic to expect, whatever has now been agreed in the Uruguay Round by way of changes in the GATT dispute settlement system, and whatever has now been agreed as to changes in the provisions of the Subsidies/Countervailing Measures Code, that any significant changes negotiated will result in an effective discipline over competition-distorting subsidies. Major trading countries will wish to keep under their own control the subsidization of production, and the use of countervail to keep out other countries' allegedly subsidized exports. (This does not preclude, of course, ad hoc arrangements regarding subsidization levels for particular products, e.g. aircraft, oilseeds.)

34. Consideration of these issues suggests that a more practical course would be to negotiate essentially procedural rules to limit recourse to countervail and to relate countervailing duty procedures to domestic subsidy levels and programmes. One such proposal is that domestic firms seeking protection by countervail against allegedly subsidized imports would be required to indicate the extent to which their own production has been subsidized. Such information would have to be taken fully into account by the authorities enquiring into injury. Indeed, it might be agreed that only that amount of subsidization of imports in excess of that received by domestic producers could be countervailed. 33/ Such a provision would make the countervailing duty system neutral, rather than protectionist. Changes along these lines, combined with the changes in criteria noted above (thresholds, injury, causation and the introduction of competition policy criteria) would go a considerable distance towards making the anti-subsidy provisions of the GATT less inequitable and less competition-distorting. Developing countries, some of which have had their exports countervailed, have an interest in pursuing these ideas in whatever forum is available.

III. THE CONFLICT BETWEEN THE ANTI-DUMPING SYSTEM AND COMPETITION POLICY

35. That there are contradictions and conflicts between anti-dumping policy and competition policy has been the subject of extensive research and comment, beginning prior to the Tokyo Round, and paralleling the growing use of anti-dumping measures by the United States, the European Union, Canada and Australia. 34/ Indeed, most of the discussion of the conflict between competition policy and trade policy has focused on the anti-dumping system. This research has made three considerations relatively clear.

36. The first is that the use of "undertakings" by the exporters to raise prices amounts to what, in practice, is a highly contrived process of collusion between domestic producers and given exporters to fix prices, using the cover of intervention by the administrative authorities. The conflict with competition policy is evident: without the cover of the anti-dumping proceeding, the fixing of prices - which is the result of the acceptance of "undertakings" - would be in contravention of competition rules, in most jurisdictions. The second is the complicated and detailed issue of the difference between how price discrimination is measured under competition policy, in a given jurisdiction, and how price discrimination (i.e. the margin of dumping) is measured under the anti-dumping provisions. The third is the issue of to what extent price discrimination should be actionable, and in what sense price behaviour can be held to be "predatory". This has been a matter of detailed discussion, and considerable debate, among competition policy experts. 35/ There is a measure of agreement that, if price discrimination involves pricing below average variable cost, it should be actionable under competition policy. It is clear, however, that the anti-dumping system allows a remedy to be imposed when the price discrimination at issue would not meet this test, and, indeed, may have been arbitrarily determined. This need not be examined in great detail, if only because there is widespread agreement that this is the case. Two details, however, may suggest how margins of dumping may be artificially created. One is by the use of averages for calculating the "normal price" in the domestic market of the exporter. If prices are fluctuating in the domestic market, the "normal price" so established will be higher than some prices in individual export transactions, even if the export transactions precisely mirror the domestic sales; thus an artificial, or contrived, margin of dumping will be found to exist. Another detail is the use of "cost of production" of the goods to determine "normal price" when there are not sufficient sales in the home market to calculate "normal value". According to the United States rules, it is provided that such "cost of production" must include an allowance for profit of not less than 8 per cent. This applies regardless of the normal profit in the exporting industry, or by that firm, or by the industry in the importing country. For example, the steel industry, which has been the subject of many anti-dumping actions, at certain points in the steel cycle may normally earn less than 8 per cent profit.

37. These issues have been examined and written about, in great detail, by antitrust and trade policy experts, in learned journals 36/ and, perhaps more important, in the business press, 37/ but, to date, with no effect on administrative practices. It is too early to say whether the complex proposals on "cost of production" agreed in the Uruguay Round will meet any of this criticism. The draft provisions are so complex, and offer so many alternatives, that they can be evaluated only in practice. 38/ (We do not

comment here on the issue of "circumvention" of anti-dumping measures - the issue of so-called "screwdriver" plants; there would be fewer cases of alleged circumvention if price discrimination in import trade (dumping) were to be calculated in less artificial terms, and in conformity with competition policy standards.)

IV. REPLACING ANTI-DUMPING WITH ANTITRUST?

38. A number of antitrust trade law experts have argued that the anti-dumping system should be abandoned, to be replaced by antitrust provisions regarding discriminatory pricing. Others regard such an approach as unrealistic and argue for a reform of the anti-dumping provisions, more or less along the lines suggested here, particularly in regard to the calculation of the margin of price difference, and for bringing the concept of injury to producers more in line with competition policy, which looks primarily to the state of competition in a given market. These ideas have been developed in great detail during discussions over the Canada/United States Free Trade Agreement in North America. Considerable attention was given by negotiators to this issue; it is known that the Canadians proposed that, for Canada-United States trade, antitrust should take over from anti-dumping. The most detailed, most useful examination of the issue was carried out for the United States Chamber of Commerce and the Canadian Chamber of Commerce, 39/ in 1990. This study, directed at the question of replacing anti-dumping with existing antitrust procedures in a free-trade area, involving two countries with considerable similarities in the law, in legal practices and in business practices, reached some conclusions of general importance.

39. First, as to the question of whether there must be harmonization of the antitrust provisions on price discrimination for antitrust to replace anti-dumping the study observed:

> "Lack of harmonization in substantive law and in procedures should not be a major issue ... it is fallacious to argue that competition law is not an adequate "substitute" for anti-dumping law <u>because</u> of differences as between the United States and Canada. Unless it is contemplated that removal of anti-dumping law in Canada-United States trade will cause a significant increase in attempts (especially by United States competitors) to apply antitrust laws to Canada-United States trade, the harmonization/differences issues are <u>sui generis</u> ... it is not realistic to suggest that anyone doing business in the United States or Canada should get preferential treatment compared with their competitors in the market ... when there is an issue of which legal regime should apply in any particular situation, that is a choice of law issue which needs to be resolved by agreed upon principles applied by the courts, quasi-judicial tribunals and administrative agencies of both countries ... . It is often asked, how can there be different pricing laws (i.e U.S.-Robinson/or Patman Act compared with the Canadian Competition Act) in a free trade area? The answer in our view is simple: sellers adjust to market requirements, whether business or legal, that differ from place to place. If one can discriminate as to price among customers in the Seattle-Tacoma area on the basis of cost but one can do so only on the basis of quantity in the nearby British Columbia market, so be it. A different legal regime for pricing might be better in both countries ... . But, that is a different debate. The free trade area

> can prosper even if differences are not ironed out, just as differences in product safety standards, packaging and labelling requirements, for example, can continue to be different ... there may be economic benefits from harmonization, but it does not have to be achieved as an ingredient of a workable free trade area."

40. The complex of procedural issues involved are judged in the following terms in the study:

> "... very little in the way of modification to the rules governing evidence gathering, jurisdiction over persons, jurisdiction over activities and enforcement of orders, will be required to achieve a smoothly running system. Indeed, because most significant businesses have operations on both sides of the border, jurisdictional issues in terms of effective enforcement may be more imagined than real. In fact, we are not aware of any complaints that activities in the United States which would violate Canadian competition laws have gone unchallenged because of jurisdictional and enforcement difficulties; nor are we aware of any complaints in the other direction ... it should be borne in mind that the legitimate interest to be protected in each country is the effect on competition in that country of anti-competitive practices, whether they occur in that country or elsewhere. This would include proscribed anti-competitive activity, such as predatory pricing, which is currently treated in much the same way under the laws of both countries."

41. We have cited the conclusions of this study at length because it appears to be the most authoritive examination of this issue, and is therefore of general import. The conclusions do not appear to depend on the existence of a "free trade" regime between the parties, but rather on the fact that there has been established a body of accepted modes of cooperation between the legal systems involved.

42. The arrangements negotiated by Australia and New Zealand under their "free trade area" go much further than the Canada/United States Chambers of Commerce study previously cited proposes. Briefly, the anti-dumping legislation of each of the two countries is not applied to imported goods originating in the other country; and the competition laws of each country have been amended to cover anti-competitive behaviour in bilateral trade. Procedurally, courts of the one country may hold hearings in the other country.

43. In theory, it can be argued that a more harmonized competition law regime could be developed as between the principal industrialized countries and that such a regime could then deal with price discrimination in import markets. The inability of Canada and the United States to abolish the anti-dumping system in bilateral trade does not suggest that there is the political will to seek such radical solutions. A study of the Mexican anti-dumping and countervailing duty regime concluded, correctly, in relation to the NAFTA negotiations: 40/

> "... it is highly unlikely that an agreement will see any type of harmonization of AD and CVD laws. The two countries' current domestic laws are too different, and the issue too politically sensitive for this

proposal to have any chance of becoming reality. The establishment of a binational panel to hear appeals of domestic decisions is a more realistic possibility ..."

44. However, it may not be entirely unrealistic to think of adding to Sir Leon Brittan's "agenda" the possibility of replacing, in a series of bilateral or plurilateral arrangements, the anti-dumping regime with a carefully circumscribed extension of national competition policy provisions and jurisdiction. Looking at the United States system, any extension of antitrust jurisdiction required would appear to be no greater than that contemplated in the 1992 decision of the United States Department of Justice to assert antitrust jurisdiction over "conduct occurring overseas that restrains U.S. exports". 41/ The first step is to address the issue dispassionately; in any such endeavour everyone will be aware that what is involved is the surrender of a considerable margin of potential protection. It would not mean, however, that predatory pricing in import trade could not be effectively remedied.

V. EVADING THE CRITERIA AND CONDITIONS OF THE GATT "SAFEGUARDS" ARTICLE: THE GROWTH OF CARTELIZATION

45. The concept of managing disruptive, or merely politically intolerable, increases of imports by arrangements under which exporting countries limit exports to particular markets is inconsistent with GATT article XI (prohibiting restrictions on imports and on exports, except in certain exceptional situations), with article XIII ("non-discriminatory administration of quantitative restrictions") and article XIX ("emergency action on imports of particular products"). GATT article XIII prohibits discrimination in those limited cases in which restrictions are permitted; article XIX allows an importing country to take temporary action to restrict imports, but on a non-discriminatory basis. Why, therefore, has there developed a series of arrangements, at the instigation of major industrialized countries, whereby exporting countries (or their industrial firms) undertake to limit the exports of particular products to particular countries (automobiles, primary textiles, garments, electronic products, steel, etc.)?

46. There are various reasons: one is that, on the part of the importing country, action outside GATT article XIX evades the criteria and conditions of that article, notably, the requirement of non-discrimination and the condition that the exporting country may take compensatory action or demand compensatory measures. Moreover, measures by exporting countries were possibly less visible and less open to criticism than measures by importing countries. This is still probably the case. Another is that, for the exporting country, an export restraint arrangement may capture some of the rent of the restriction; of course, for a domestic market largely supplied by domestic producers, some of that rent from the restrictions is realized in terms of higher prices and market share, but to the extent that export restrictions raise prices in the domestic market of the importing country, an export restraint system will enable exporters to capture some of the rent. In an industry where there are many sources of imports, a bilateral export restraint system will serve to guarantee market share for those exporters (and exporting countries) who could not compete in the absence of restraint.

47. Speaking generally, exporting countries have understood these issues, and have made considerable efforts to keep the administration of export restrictions under their administrative control. Some observers have felt that, for the United States at least, the major cases of export restraint negotiated by that country could have been handled under GATT article XIX, and should have been. (One experienced observer goes further, arguing that the anti-dumping and countervailing duty system should be scrapped, and all "import relief" cases handled under GATT art. XIX). 42/

48. The fact that article XIX measures, and "surrogates" thereof - such as "voluntary export restraints" imposed by Governments, "industry-to-industry" understandings (such as have been worked out between the United Kingdom and the Japanese automotive industry) or "orderly marketing arrangements" - impose costs on the importing country is well understood. However, costs for some are rents for others. How those rents are distributed varies by the measure applied and the characteristics of the product market. The concern raised here is not only the allocation of the rent, important as they may be to the exporting country but the cartelizing impact of the "surrogate" measures. This impact is felt in two directions. First, in the importing country: all forms of protection against imports limit competition ("trade policy is competition policy"). 43/ The question to be asked is how serious are the effects on competition of any given measure of protection. It should be noted that the price an exporting country pays is the impetus this gives to cartelization in its industry. If the export restraint arrangement is worked by the industry, the allocation of market shares among firms is the sort of action which should be penalized under the competition law of all countries with effective competition laws.

49. The subject of cartelization induced by "export restraint" systems has been extensively analysed. Many studies have tried to estimate the costs involved in particular "restraint" arrangements. Over the past 15 years or so - as it became increasingly evident that restraint arrangements for textiles, garments and autos, to take major examples, were likely to be around for a long time - nothing new has emerged in terms of analytical insights - nor of prescriptions. Both importing countries and exporting countries continue to shun the discipline of GATT article XIX, and there is little evidence of any political will to back away from "managed trade"; indeed the current proposals being discussed for steel suggest that a major extension of the "managed trade" system is contemplated. The 10-year period proposed in the Uruguay Round for phasing-out restrictions on textiles and garments which are applied outside GATT article XIX is too long a time to be taken as evidence of any meaningful rejection of "managed trade".

50. If we try to sum up what can now be said, after 20 or 25 years of debate, about the interface and the interaction between GATT "safeguards" policy and competition policy a number of points come to mind. The Havana Charter/GATT system with regard to the proper use of article XIX - the "escape clause" - has long since collapsed. Rather than institute non-discriminatory import restricting measures, many countries still prefer various "surrogate" measures. These measures frequently involve either the exporters, or their governments, agreeing to limit exports to particular markets. Such measures are in obvious conflict with competition policy and with the stated rationale of the post-war trade policy system embodied in the General Agreement on Tariffs and Trade.

51. The two key trade policy issues with regard to GATT article XIX itself are first, whether or not discrimination, the distinguishing mark and the fatal attraction of "surrogate" measures, should be taken into the article, and secondly, providing for more effective international scrutiny of all "safeguard" actions, including scrutiny of such "surrogate" measures as might remain. From a competition policy view, the issue is how to bring competition policy concepts, and competition policy rules into the decision process on whether to use article XIX (or some "surrogate" measure). This is a relatively simple issue, as compared with the issue of how the political will to take such action can be mustered.

52. Bringing competition policy to bear on article XIX and "surrogates" would involve the following: 44/

(a) Decisions to restrict imports should take into account the structure of competition in the industry seeking protection; this would go beyond the formal language of article XIX, which speaks only of "injury" to domestic producers. A highly competitive industry faced with a sudden requirement for rapid adjustment to a new source and volume of import competition might be treated differently from an uncompetitive industry in which one or a few firms dominate the market.

(b) Decisions to restrict imports should take into account the structure of competition in the industry which is the source of the imports at issue. Is it a highly protect industry - by tariffs, quotas, procurement preferences, or is it highly competitive? If an exporting industry is making oligopoly profits in its domestic market, because of the structure of the industry or because of protection, it might be treated more severely than a highly efficient industry in a competitive market.

(c) Measures which encourage, even enforce cartel-like behaviour in either the exporting country or the importing country should be avoided. Short-term, digressive tariffs are less likely to have such effects than discriminatory export restraint measures or discriminatory quantitative import measures.

53. Applying more rigorous thresholds and more rigorous concepts of "injury" and of "causality" would be consistent with this approach.

VI. THE IMPACT OF COMPETITION POLICY ON TRADE

54. The foregoing discussion has focused on the anti-competitive impact of various trade policy provisions. Suggestions have been made as to how these anti-competitive effects might be reduced, in the main, by changes in trade policy. While it is true that the whole range of competition policy actions, whether in regard, for example, to mergers or to restraints on trade, will also affect trading activities, there are nevertheless certain competition policy measures which explicitly and overtly address trade-policy concerns.

55. One example is the potential use of the antitrust provisions against foreign restraints on exports to the foreign market. The United States Department of Justice proposes to try to clarify its jurisdiction in this area; here there is, essentially, a trade policy objective. The United States has, of course, been prepared to use (or to allow private plaintiffs to use)

the antitrust provisions against conduct by foreign firms, including firms not subsidiaries of American firms, which appeared to affect adversely United States exports. There is a substantial body of United States antitrust jurisprudence on this issue; the April 1992 statement represents a reassertion of long-established practice and only a moderate extension of jurisdiction. 45/ Another trade policy objective being addressed by an antitrust mechanism is the recently enacted extension of an antitrust "exemption" by the United States; the antitrust "exemption" for "joint ventures" for research is extended to joint ventures for the exploitation of export markets - but limited by joint ventures with production facilities in the United States and involving only United States domiciled corporations or corporations domiciled in countries which "treat United States companies fairly under their antitrust laws governing joint ventures". 46/ To envisage an antitrust exemption in regard to domestic facilities, but not in regard to foreign facilities (which might, of course, produce goods which would displace exports from the United States) is clearly using antitrust to serve a trade policy objective. This proposal may be perceived as an extension of the ideas underlying the United States Webb-Pomerene Export Trade Act of 1918 - which sets a series of precise conditions for antitrust exemptions for firms wishing to act together in regard to export markets. (While the United States legislation on this issue is often commented on, and negatively, one may assume that whatever their legislation may cover, most countries will not actively pursue their companies which may be colluding to promote exports; it is merely that it is United States practice which attracts attention.) 47/ Without trying to examine this complex and separate subject in detail, it is obvious that, for example, if a country allows its exporters to agree together on steps to compete better in a foreign market, e.g. by agreeing on prices, acute problems arise for the importing country. In such a case, should it invoke anti-dumping measures, or should it invoke antitrust measures? The sort of "agenda" suggested by Sir Leon Brittan for cooperation and coordination in competition policy might well be extended to deal with this sort of issue.

VII. THE ISSUE OF "EXTRATERRITORIALITY"

56. We have noted certain important ways in which competition policy is overtly trade policy, without taking away from the generality of the statement that all measures which address the structure of competition in a market have trade impacts - as well as the corollary, that trade policy is about competition. However, the question of how to substitute competition policy measures for trade policy measures raises the problem of how to address the extraterritorial extension of competition law jurisdiction. The United States has been seen to be the country that most frequently asserts its antitrust jurisdiction outside its territory; this tendency to assert the jurisdiction of its courts and the rule of American law outside the United States is not confined to the antitrust field. It has been observed, for example, in relation to strategic export controls and in regard to financial services. However, it should be kept in mind that other countries with moderately active competition policies, e.g. countries in the European Union as well as Canada, have felt inevitable pressure to assert some degree of extraterritorial jurisdiction. However, from the point of view of trade policy, particularly the so-called "trade remedy" laws, the notion of asserting some extraterritorial jurisdiction may not be a major obstacle to reform of the trade laws. Under two GATT article VI codes (on Anti-dumping and on Subsidies/Countervailing Measures) it is provided that officials of the

importing country investigating a complaint by their domestic producers may carry out their investigations **in the territory** of the exporting country, 48/ to wit:

> "The investigating authorities may carry out investigations in the territory of other signatories as required, provided they have notified in good time the signatory in question and unless the latter objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the signatory in question is notified and does not object.
>
> "In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available."

57. It is clear from the second paragraph of this citation that firms being investigated have a considerable incentive to allow foreign officials access to their records. Indeed, in customs administration generally, the practice of officials carrying out investigations abroad has been long established (it was traditionally important for countries using ex-factory prices as the basis for customs and commodity tax valuation). In the perspective of these trade policy practices, using competition law to replace or modify some types of trade law action does not give rise to any very forbidding prospect of extraterritorial jurisdiction. Indeed, the series of bilateral accords negotiated in the past few years (European Union-United States, United States-Australia, United States-Canada) providing for cooperation in the antitrust field suggests that, despite the recourse to so-called "blocking" statutes by countries wary of United States assertion of antitrust jurisdiction, the issue of extraterritoriality may be manageable, and indeed, a multilateral arrangement might eventually supplant existing bilateral agreements.

VIII. CONCLUSIONS: WHAT ARE THE IMPLICATIONS FOR DEVELOPING COUNTRIES?

58. The discussion above highlights the growing links and areas of overlap between trade policy and competition policy, and the serious contradictions between how some trade policy instruments are used and the stated objectives of competition policy. As these two policy areas increasingly interact or even conflict, there will be various implications for various countries. These issues will seem quite different in, on the one hand, the large, developed economies (European Union, United States of America and its free trade area partners, Japan) with highly detailed trade legislation and with articulated competition policies, with highly trained bureaucracies, with private sector legal skills (the trade bar, the antitrust bar) and in, on the other hand, the various smaller economies which may see the larger economies deploying trade policies against their exporters' pricing practices or against their domestic subsidies, or against what they assume is their comparative advantage (e.g. lower wages, different labour standards, different environmental standards). Since the conclusion of the Uruguay Round all countries will have to find ways to mesh competition policy and trade policy

more effectively. Some prescriptive notions follow from the discussion above; these are set out primarily to provide a basis for fruitful international discussion.

A. Anti-dumping

59. A basic issue is to bring the anti-dumping provisions under better international control. The anti-dumping system is an effective barrier when employed by larger countries against developing country exports. It is less effective in disciplining large firms in large domestic markets when deployed by smaller developing countries. It should remain possible for an importing country to take effective action against damaging price discrimination, whether by domestic producers or by foreign producers. However, by measuring price discrimination (in any given country) by one single set of standards, the protectionist bias of the present anti-dumping arrangements would in part, at least, be removed. In parallel, the setting of reasonable thresholds for action and a more careful definition of "injury" and "cause" would bring the anti-dumping system much closer to the standards of national legislation on price discrimination. Developing countries have much to gain, and nothing to lose, by pushing for the necessary changes in the GATT rules, and in pushing for more effective scrutiny of anti-dumping actions against their exports.

60. This agenda would raise the question of whether or not it is really necessary, in a given country, to have a separate set of provisions to deal with price discrimination in import trade. That question could well be settled by each individual trading country in the light of its own competition policy legislation. The question of one system or two is a second-order question. Developing countries, which will increasingly face the need to scrutinize the behaviour of large firms, from a competition policy point of view, may well find that articulating their competition law to deal with injurious dumping is a practical approach.

61. Effective competition policy creates pressures to extend national jurisdiction extraterritorially. This is not necessarily more reprehensible than the extraterritoriality now accepted in the conduct of trade remedy law investigations. Developing countries which may opt to use their competition policy to deal with injurious dumping (as defined above) will find that if they model the extraterritorial reach of their legislation on the jurisdiction asserted now by the larger powers, they will have sufficient jurisdiction to deal with damaging price discrimination in import trade.

B. Harmonization?

62. The case has not been made that competition policy legislation should be harmonized as between countries; the views set out above do not require "harmonization" in this sense. What will be required is cooperation and consultation: the emerging structure of bilateral consultative arrangements should be elaborated; in this UNCTAD can play a substantial role in organizing the expertise needed by developing countries seeking to elaborate competition policies.

C. Anti-subsidy policy

63. Trade policy on subsidies is an entirely different issue. Anti-dumping addresses the pricing practices of individual firms; anti-subsidy policy, in

so far as imports are concerned, uses the taxing power of one State to offset the expenditure policy of another State - perhaps a policy that has a powerful political and economic rationale, such as reducing extreme variations in per capita income as between regions. Unless countries are prepared to invoke the existing GATT Code provisions in regard to import-replacing subsidies, the anti-subsidy arrangements in the GATT will remain asymmetrical and inequitable. Thus, the more immediate problem is to bring countervail under control; like anti-dumping, countervail is a large country weapon which can be used to discipline and, of course, damage exporting developing countries.

64. Developing countries have an obvious interest in bringing countervail under control. It may be that only if countervail is used by developing countries will there by any willingness on the part of the larger countries to accept reforms.

D. Quantitative restraints on trade

65. The thrust of the discussion here on quantitative restraints on trade is that they impose considerable costs on importing countries and have cartelizing effects on exporting countries. They do give rise to rents, some of which may be captured by the exporting country or by exporters, and they may act as guarantees of market share. As developing countries improve their export performance, they may come to consider that the short-term gains from participating in systems of quantitative trade controls are less than the longer-term costs, particularly with respect to the cartelizing impact of such systems. In this policy area, in practice the attitude of Japan has been crucial; if Japan were to back away from the policy of limiting so many of its exports, on a bilateral basis, to so many markets, there would be less scope, and less pressure, for developing countries to participate in such arrangements. Until Japanese policy changes, there will be great pressure on developing countries to agree to limits on exports. Since the conclusion of the Uruguay Round it will soon become clear whether the trading system will move away from managed trade or embrace it permanently. In the latter case, it is the developing countries which will pay the long-term price of limiting their export markets, imposing cartelizing measures on their economies, and reaping only short-term rents.

E. Trade-Related Investment Measures (TRIMs)

66. As the Uruguay Round proposals on trade-related investment measures become a working agreement, developing countries may wish to ensure that large foreign-controlled corporations, while bringing undoubted benefits in terms of improved competition and new direct investment, do not abuse their market powers. This is just as relevant to services firms as to goods-producing firms or those in the extractive industries. Part of the rationale for investment measures by developing countries has been that they may provide a mechanism to control transnational corporations. It is clear that trade policy, in this context, is inadequate. The anti-dumping system, for example, is not able to deal with "hidden dumping" by transnational firms - that is, artificially low transfer prices for components - if only because such prices can be so easily disguised. 49/ Competition policy legislation provides perhaps the only means by which the Government of a developing country with a market economy can exercise legitimate control over large foreign or transnational firms without undermining the pro-competitive effects of foreign investment. This increasing requirement for developing countries to make

competition legislation operational will in turn raise the obvious question of to what extent competition policy measures can, for them, replace trade.

F. Intellectual Property Rights (IPRs)

67. Much the same argument can be made in regard to intellectual property rights (IPRs). The relationship between patent, trade mark and copyright law, on the one hand, and competition policy law, on the other, is far too complex to consider in the space remaining. However, it should be noted that, as the developing countries put in place more effective systems of granting and protecting the time-limited monopolies inherent in intellectual property rights, they will also need to establish rules to prevent these rights becoming the basis for excessive market power, e.g. hindering imports of patented products from other sources. In this area trade policy measures are relatively ineffective. Like TRIMs, for IPRs one of the unintended results of the Uruguay Round may well be increases in the detail, complexity, scope and utility of competition policy legislation in developing countries.

G. Protectionism in competition policy?

68. Competition policy can, of course, be used in a protectionist fashion. For example, a takeover by a foreign firm may be prevented because the new firm would compete more effectively with an existing domestic producer. There will inevitably have to be much more consultation and some evolution of cooperative mechanisms to keep such protectionism from creeping into national competition policy systems. And, more specifically, the issue of anti-competitive behaviour in export trade will have to be reviewed. In such a context, protectionism enters as uncompetitive behaviour. At this stage, it would be premature to say that the limited, tightly-framed exemptions given to export activity in the United States (in the Webb-Pomerene Act) and, of course, in other countries, should be more circumscribed. One can be reasonably sure that whatever the statute or regulations may say, very few administrations will be willing to be excessively zealous in policing anti-competitive behaviour in export trade, as long as it does not too obviously have effects in domestic markets. Developing countries may therefore wish to consider what sort of "agenda" of trade policy can encompass this sort of issue.

IX. A FINAL COMMENT

69. This brief note addressing the conflict between trade policy and competition policy has focused on certain important trade-policy devices - namely, anti-dumping, anti-subsidy measures, quantitative limits on trade - and has only briefly alluded to other areas, such as TRIMs (and investment by transnational corporations in developing countries) and IPRs. It should, however, be clear that what Feketekuty (c.f. note 6) called "the competition paradigm" may well indicate in what direction trade policy, from the point of view of developing countries, should go. This paper began by looking at Sir Leon Brittan's "agenda" for competition policy; the "agenda", post-Uruguay Round, may involve a substantial redesign of measures affecting trade; moreover in following that agenda, developing countries may have many reasons, and perhaps some opportunities, to seize the initiative.

Notes

1/ Sir Leon Brittan, "A Framework for International Competition", Davos, Switzerland, 5 February 1992; "Draft International Antitrust Code", Munich, July 1993, reprinted in 64 Antitrust and Trade Regulation Report No. 1628, 19 August 1993, Washington, D.C., The Bureau of National Affairs.

2/ United Nations Conference on Trade and Employment, Final Act and Related Documents, Lake Success, N.Y., April 1948, ("The Havana Charter"), chapter V; articles 46-54, "Restrictive Business Practices".

3/ See the various papers in OECD, The Costs of Restricting Imports/The Automobile Industry, Organisation for Economic Cooperation and Development, Paris, 1987.

4/ For an earlier OECD study of these issues, see "Trade Policy and the System of Contingent Protection in the Perspective of Competition Policy", prepared by Rodney de C. Grey, (DAFFE/RBP/WP1/86.3), February 1986. For comments, see: "Idealism versus Pragmatism: Policy and the Academic Analyst" by Michael Hart, in Trebilcock, York (eds.) Fair Exchange, p. 278, and "The Interface Between Anti-Dumping and Competition Law and Policy in the European Community", by P. Vandoren, Legal Issues of European Integration, 2, 1986, p. 15.

5/ For two recent OECD studies, see Predatory Pricing (1989) and Obstacles to Trade and Competition (1993).

6/ Geza Feketekuty, The New Trade Agenda, Group of Thirty, Washington, D.C., 1992.

7/ Pre-1986 writings on this subject are listed in Grey, op. cit. (note 4 above). Some of the more important of the post-1986 papers, which are very numerous, are also cited therein.

8/ Article 9, para. 4 (b), articles 12 and 13 of the Subsidies/CVM Code: GATT Contracting Parties, BISD, 26 S, pp. 56-83.

9/ See, Joseph F. Francois, N. David Palmeter, Jeffrey C. Anspacher: "Conceptual and Procedural Biases in the Administration of the Countervailing Duty Law" in Richard Boltuck and Robert E. Litan (eds.): Down in the Dumps/Administration of the Unfair Trade Laws, Washington, D.C., The Brookings Institution, 1991, pp. 95-151.

10/ An early key analysis of these issues was made by Jan Tumlir, "The New Protectionism, Cartels, and International Order", in Amacher, Haberler, Willet (eds.), Challenges to a Liberal International Economic Order, 1979. The many detailed studies of the impact of quantitative restraints since this basic article was published have provided detailed confirmation of Tumlir's analysis, but not added essentially new analysis. There are several relevant studies by the United States Federal Trade Commission and a number of individual private studies. A useful early study is that by David Greenaway and Brian Hindley, What Britain Pays for Voluntary Export Restraints, London, Trade Policy Research Centre, 1985; see also R.W. Crandall: "The Effects of

United States Trade Protection for Autos and Steel", Brookings Papers on Economic Activity 1, 1987, pp. 271-288. See also items cited in note 3 above. See also, G. Hufbauser, K. Elliot: Measuring the Costs of Protection in the United States, Washington, D.C., Institute for International Economics, 1993, and also note 3 above.

11/ See, Gary N. Horlick: Testimony before the Committee on Ways and Means, Subcommittee on Trade (United States House of Representatives) 23 January 1993:

> "The inclusion of a de minimis market share provision [in draft Article 5.8] will not result in a great departure from current practice. In fact, it has been normal practice in the United States, European Community, Canada and Australia to consider imports to be 'negligible' when they represent a limited share of the domestic market.
>
> "The United States and European Community generally dismiss cases on the basis of de minimis market share when imports account for less than one per cent of the domestic market. The Australian anti-dumping authorities have dismissed cases when imports accounted for as much as 10 per cent of the Australian market, stating that '[t]he Authority has difficulty in accepting that import penetration of such a magnitude was sufficient to cause material injury'. It is more difficult to discern a clear rule used by Canada, though cases have been dismissed when imports accounted for as much as 4.6 per cent of the Canadian market."

12/ Ibid.

> "The Dunkel Text includes a new de minimis dumping margin standard of 2 per cent below which anti-dumping duties shall not be imposed. This will require a change in United States law to raise the existing 0.5 per cent de minimis standard to 2 per cent. In practical terms, however, this will have no impact on the vast majority of United States cases. Moreover, it is established practice in the European Community and Canada to consider dumping margins of less than 1.5 per cent to be de minimis. While Australia does not have a formal de minimis margin rule, in one case the Australian authorities referred to 5 per cent margins as 'quite insignificant'. In another case, they referred to a 6.25 per cent margin as 'so small'. Duties were not imposed in either case."

13/ N. David Palmeter: "The Antidumping Law: A Legal and Administrative Nontariff Barrier" in Boltuck and Litan (eds.) op. cit. at p. 87:

> "Raise the de minimis level of 0.5 per cent to 5 per cent. The current de minimis standard, 0.5 per cent, pretends to a precision that is rarely achieved in anti-dumping investigations, and, if achieved, is reached only at enormous cost. A 5 per cent standard has the virtue of being consistent with the exchange rate regulations of the department [of Commerce], which require conversion of all currencies involved in an anti-dumping investigation into United States dollars. The exchange rate used is the quarterly rate set in advance by the Federal Reserve Bank of New York. This rate is used throughout the quarter unless, on any particular day, the daily rate varies from it by more than 5 per cent.

When this happens, the daily rate is used for that day only. This method can lead to some odd results. For example, if the preset quarterly rate is 100, it is applied to all transactions completed during a given quarter when the daily rate ranges from 96 to 104. But when the daily rate falls to 95 or below, or rises to 105 or above, the daily rate is used. Hence, a 104-106-104 rate pattern would be translated by Commerce as 100-106-100, whereas a 96-104-96 pattern would be 100-100-100. It is obvious that there is enough play in this exchange rate policy alone to make the 0.5 per cent de minimis standard meaningless. Indeed, the 5 per cent magnitude of flexibility in the exchange rate policy is 10 times greater than the 0.5 per cent de minimis level."

14/ See Francois, Palmeter, Anspacher, op. cit. (note 9 above) pp. 131-132:

"Raise the de minimis standards, and apply them on a program-by-program basis. Currently, the department [of Commerce] perpetuates the myth of accounting precision by applying a ridiculous de minimis standard of 0.5 per cent. This standard is applied after all net benefits attributed to various programs have been summed. Yet the department's procedures are subject to errors of assumption and measurement that apply on a program-by-program basis. In Canadian Pork, for example, the department found a total net benefit of Can$ 0.079657 per kilogram. This was rounded up to Can$ 0.080000, a difference of 'only' Can$ 0.000343. Yet this rounding error was greater than the benefits from 10 of the 18 individual programs that the department countervailed. These programs were by and large domestic programs that had no discernable effect on trade performance. For some programs, the department found net benefits ranging from one ten-thousandth of a Canadian cent to sixty-six ten-thousandths of a Canadian cent per kilogram. All were included in the final rate duty.

"Apply a 5 per cent de minimis standard for domestic subsidies. Domestic subsidy programs do not have the same effect on export performance as export subsidies at identical rates. In addition, domestic subsidy programs can be used as legitimate policy tools and are recognized explicitly as such in the GATT Subsidies Code. Even if the department continues with its current cash-flow approach to the determination of subsidy rates, a higher de minimis standard for domestic subsidies would be a simple way to recognize the distinction between export and domestic subsidies that is drawn in the GATT Subsidies Code."

15/ For proposals to revise the injury test in United States trade remedy laws, see Diane P. Wood: "Unfair Trade Injury: A Competition Based Approach", 41 Stanford Law Review, May 1989, pp. 1,153-1,200. The notion of there being a "progression" in the GATT "injury" provisions was set out in Rodney de C. Grey: Injury, Damage, Disruption (UNCTAD/MTN217, October 1981) and also referred to in Grey, OECD (note 4 above).

16/ Trade Agreements Act, 1979; for detailed discussion, see Rodney de C. Grey, U.S. Trade Policy Legislation/A Canadian View, Montreal, Institute for Research on Public Policy, 1982, pp. 43-46.

17/ For a discussion of the role of power in negotiations on textile trade, see Henry Kissinger: The White House Years, 1979, pp. 325-340.

18/ In jurisprudence "causality" is a complex concept; see, for example, the definitions of the various uses of the term "cause" in any dictionary of legal terms, for example, L.B. Curzon: A Dictionary of Law, 2nd Edition, Macdonald and Evans, p. 52. An important general discussion appears in H.L.A. Hart: Causation in the Law, 1962; see, generally, chapter 7, "Causation" in Wright, Linden, Kar (eds.), Canadian Tort Law/Cases, Notes and Materials, Toronto, Butterworth, 1985, pp. 7-1/7-25 (including an excerpt from Hart, cited above). For a discussion of causation in international law, see Michael Strauss: "Causation as an Element of State Responsibility" in 16 Law and Policy in International Business, No. 3, 1884, pp. 893-926. For a discussion on how the causality requirements of article VI appeared on the morrow of the Tokyo Round, see Rodney de C. Grey: United States Trade Policy Legislation/A Canadian View, pp. 46-47; this was an unduly optimistic analysis. In a recent United States ITC determination, different Commissioners took somewhat different views on "causality", in reaction to the argument advanced by one exporter's counsel, along the lines argued in this paper. See United States ITC Steel Wire Rope, USITC 2613, March 1993, footnote 104, pp. 26-27, footnote 7, p. 42, footnote 41, p. 73.

19/ The United States approach to "causality" under article XIX led to the anomalous situation, in one important case, where the United States was not able to invoke its art. XIX rights; therefore it was decided to seek a bilateral restraint arrangement with the Government of the exporting country. The case, which remains of considerable importance, is United States ITC Certain Motor Vehicles TA-201-44, December 1987. Seeking a restraint arrangement with the exporting country concerned, after the ITC had made a negative determination of injury, made the United States look "protectionist". However in this important instance, it probably had an arguable article XIX case, by existing GATT standards; moreover the United States accepted a level of import penetration much higher than has been accepted in certain other import markets (e.g. in certain European Union member States). The same is not necessarily true in regard to other restraint arrangements, particularly those in the textile and garment sectors, which have not been subject to ITC scrutiny under United States article XIX provisions. For a more detailed discussion, see Grey, op. cit., note 18 above, pp. 17-32.

20/ Financial Times: "The week in Luxembourg"/"Investigations of dumping must not ignore issues of competition", (C358/89 Extramet Industrie S.A. v. Council), 16 June 1992.

21/ Chemical Fertilizer, 1983, cited in Van Bael, Bellis: International Trade Law and Practice, p. 85, (cf. also footnote 14).

22/ GATT, Contracting Parties, BISD, 26S, p. 174. Paragraph 4 of article 3 and the relevant footnote reads as follows:

> "4. It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors 2/ which at the same time are injuring the

industry, and the injuries caused by other factors must not be attributed to the dumped imports.

"2/ Such factors include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

This is a much more detailed provision than the corresponding provision in the Kennedy Round Anti-dumping Code, which referred only to "competition between the domestic producers themselves ..." (in para. (c) of art. 3 of that Code).

23/ The Canadian Special Import Measure Act (SIMA) purports to transpose the GATT Code provisions into domestic law; however, there is no statutory language corresponding to article 3 of the GATT Code, which sets out the obligations with regard to "determination of injury"; moreover, given that there is an explicit reference in SIMA to one code provision, i.e. paragraph 1 of article 4 ("regional industry"), it may be inferred that the administrative authorities are not required to "take fully into account" other code provisions.

24/ GATT, Contracting Parties, BISD, 26S, p. 65.

25/ For some comments on the origins of anti-dumping as a reaction to the activities of "trusts and combinations", see Jacob Viner: Dumping: A Problem in International Trade, (New York, Kelly Reprints of Economic Classics, 1966). Viner (at p. 33) cites a United Kingdom Board of Trade report: "the fact that dumping is a policy habitually practised by the German kartells is beyond controversy". See also Grey: The Developments of the Canadian Anti-dumping System, Montreal, Private Planning Association of Canada, 1973. At p. 8:

"The anti-dumping mechanism was brought forward ... (in 1904) as an alternative to a more general increase in tariff rates. It was protection against dumping - against the predatory disposal of surpluses by large and protected producers in the United States and overseas - which was needed, ... it could be better done by a comprehensive system of remedial duties to be levied when goods were found to be dumped than by imposing the burden of an unnecessarily high tariff on Canadian consumers. this is still the main argument for an effective anti-dumping system."

26/ Van Bael and Bellis, op. cit., comment, at p. 103, on European Community practice:

"A price revision undertaking consists of a written statement filed with the Commission by each of the exporters willing to increase the prices of its exports to the Community. Therefore, in law, the operation can be described as a series of unilateral acts on the part of the exporters concerned. ... for an undertaking to be workable and fair, the Commission will have to make sure:

- that the price increases agreed upon by each of the exporters are more or less in line; and

- that the European industry will increase or at least maintain its current price levels rather than undercutting the prices agreed upon by the exporters.

Under these circumstances, it can be argued that the Commission is in effect acting as a conduit through which the exporters and local industry harmonize price levels. This can be said to be the natural consequence of the conflicting aims pursued by antitrust and anti-dumping policies. Thus far, no antitrust case has arisen concerning the 'negotiation' of a price revision undertaking. Perhaps the fact that the EEC antitrust and anti-dumping rules are enforced by one and the same institution, the Commission, provides a ready explanation for the relatively peaceful coexistence of the two sets of rules."

See also P.A. Messerlin, Antidumping Regulations or Procartel Law?/The EC Chemical cases, Washington, D.C., World Bank PRE Working Papers, April 1990.

27/ OECD, op. cit., note 3 above.

28/ Cited, OECD restricted document.

29/ See, Klaus Stegemann, "Special Import Legislation: Deterring Dumping of Capital Goods", 8 Canadian Public Policy, 1982, pp. 573-585; Klaus Stegemann, "The Net National Burden of Canadian Antidumping Policy: Turbines and Generators", 15 Cornell International Law Journal, 1982, pp. 293-351; Rodney de C. Grey: "Dumped or Subsidized Capital Equipment" in Comments on Proposals on Import Policy, submitted to the Sub-Committee on Import Policy of the Canadian House of Commons Standing Committee on Finance, Trade and Economic Affairs, September 1981, reprinted Grey: US Trade Policy Legislation, pp. 108-113.

30/ GATT Contracting Parties: BISD, 26S, pp. 56-83.

31/ Articles 8 and 13 of the Code, cited note 23 above.

32/ There is a growing body of literature on the GATT dispute settlement system. A basic text is that of Robert E. Hudec, "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business", 13 Cornell International Law Journal, No. 2, Summer 1980, pp. 145-203. See also Robert E. Hudec, Developing Countries in the GATT Legal System, London, Trade Policy Research Centre, 1987, particularly part II; Robert E. Hudec, D.L.M. Kennedy, and Mark Squbossa, "A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989", 2 Minnesota Journal of Global Trade, No. 1, Winter 1993, pp. 1-113.

33/ See Rodney de C. Grey: "Some Propositions About Domestic Subsidies", paper prepared for the Centre for Applied Studies in International Negotiations, Montreux, Switzerland, 1989. The other papers prepared for this

conference were published by the World Bank in Bela Balassa (ed.): Subsidies and Countervailing Measures, 1989 but this paper was not included. (The World Bank publication contains useful bibliographical information.)

34/ See Rainer M. Bierwagen, GATT Article VI and the Protectionist Bias of Anti-dumping Laws, Deventer/Boston, Kluver, 1990, (extensive bibliography).

35/ On the issue of price discrimination in competition policy, see, for example, Louis Phlips, The Economics of Price Discrimination, London, Cambridge University Press, 1983, with extensive bibliography on the economic aspects of price discrimination; OECD, Predatory Pricing, 1989; Mark Friend, Derek Redyard, "The limits of price competition", (Business Law) Financial Times, 28 November 1991; Richard A. Posner: Antitrust Law/An Economic Perspective, Chicago, 1976; Earl W. Kintner, A Robinson-Patman Primer (second edition), Macmillan, 1979.

36/ These issues are examined authoritatively in Boltuck and Litan (eds.) op. cit.

37/ See, for example Brian Hindley, "The Design of Fortress Europe", Financial Times, 6 January 1989; "Protectionism in the GATT", Financial Times, 7 June 1991. Also Martin Wolf "The dumping inquisition", Financial Times, 28 July 1988. Patrick Messerlin: "Community rules and collision course", Financial Times, 28 February 1990. Patrick Messerlin and Y. Noguchi, "EC industrial policy: worse than before", Financial Times, 29 October 1991. P. Messerlin and Y. Noguchi "A gun that needs to get knotted", Economist, 9 September 1989. Peter Montagnon and David Buchan: "Stretching the GATT to its limits", Financial Times, 3 August 1988. Christopher Norall, "Dumping dilemma" (letter to the editor), Financial Times, 23 December 1988. A.H. Herman "Antidumping and the Euro-Court", (Business Law) Financial Times, 17 November 1988. The views of the EC Commission in this debate in the Financial Times were set out in: Horst G. Krenzler: "Fortress Europe is a myth", Financial Times, 19 January 1989. Willy de Clereq: "Fair practice, not protectionism", (Business Law) Financial Times, 21 November 1988.

38/ For comment, see Horlick, op. cit., note 11 above.

39/ Feltham, Salen, Mathieson, Wonnacott: Competition (Antitrust) and Anti-dumping Laws in the Context of the Canada-U.S. Free Trade Agreement, Chamber of Commerce of the United States/Canadian Chamber of Commerce, 1990. See also Michael Hart, "Dumping and Free Trade Areas" in Jackson end Vermulst (eds.): Antidumping Law and Practices, New York, Harvester Wheatsheaf, 1990, pp. 326-342.1.

40/ Longley and Wu, "Mexican and U.S. Antidumping and Countervailing Duty Policies: Issues in the Free Trade Negotiations", 23 Law and Policy in International Business, Summer 1992, p. 912. [AD stands as an abbreviation for "antidumping" and CVD for "countervailing duty" in the quotation appearing in the text.]

41/ Celia Hampton "Long arm of U.S. antitrust law", Financial Times, 30 April 1992. See also the 3 April 1992 United States of Justice statement: "The Department of Justice will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains US exports, whether or not there is direct harm to US consumers, where it is clear that:

> "1. the conduct has a direct, substantial and reasonably foreseeable effect on exports of goods or services from the US;
>
> 2. the conduct involves anti-competitive activities which violate the US antitrust laws - in most cases, group boycotts, collusive pricing and other exclusionary activities; and
>
> 3. US courts have jurisdiction over foreign persons or corporations engaged in such conduct. This policy statement in no way affects existing laws or established principles of personal jurisdiction."

The Department of Justice Antitrust Enforcement Guidelines For International Operation are reprinted in 12 World Competition, No. 3, March 1989, pp. 105-207.

For a general review of "extraterritoriality" in U.S. trade law, see: Stanley Marcuss, Eric L. Richard, "Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory", 20 Columbia Journal of Transnational Law, 1981, pp. 439-483; see also Gary B. Born, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 Law and Policy in International Business, No. 1, Fall 1992, pp. 1-100.

42/ Noel Hemmendinger, "Shifting Sands: An Examination of the Philosophical Basis for U.S. Trade Laws", in Jackson et al (eds.), International Trade Policy: The Lawyer's Perspective, (1985), pp. 2-4, observes that: "Big cases have also eluded Title II of the Trade Act of 1974, [the 'Escape Clause']. Textiles, steel and autos have been handled outside that framework - specialty steel, televisions and footwear within it. I believe that the first three should have been dealt with under Title II."

43/ See Richard Blackhurst, "Trade Policy is Competition Policy" in OECD, Competition and Economic Development, 1991, pp. 253-257. On p. 254 he notes that:

> "... import barriers invite collusive behaviour by firms, and ... if explicit or implicit collusion occurs it will impose added costs on the economy - that is, costs in addition to the costs associated with the decision to protect inefficient domestic producers. It follows that (i) vigorous enforcement of strong antitrust policies is essential in countries in which imports are restrained by high tariffs, quantitative restrictions and other non-trade measures, and (ii) the costs of operating an effective antitrust programme in a collusion-prone economy should be taken into account in assessing the gains from reducing import barriers."

44/ There are many aspects of competition policy and many subjects treated in competition legislation which have no counterpart in trade policy. Some of these measures, such as rules on mergers, can have an effect on trade, and to that extent it would be true to say that competition policy is a trade policy. Among the subjects addressed by competition legislation for which there are no precise trade policy equivalents are: provisions on restraints on trade, provisions regarding mergers and joint ventures, provisions on vertical price restraints, provisions on non-price restraints. (This list of subject areas is drawn from the study by Lawson Hunter, Mark R. Gillen, Douglas Rosenthal, W. Todd Miller: Canadian U.S. Antitrust Law - Implications for Trade Negotiations, July 1986 (photocopy).

45/ For a careful account of the "International Aspects of Antitrust", see A.D. Neale and D.G. Goyder: The Antitrust Laws of the U.S.A., Cambridge University Press, 1980, Chapter XI.

46/ Antitrust and Trade Regulation Report, para. 10, 1993, vol. 64, pp. 688-1, 188-2.

47/ Neale and Goyder, op.cit., chapter XI.

48/ GATT, Contracting Parties, BISD, 26S, article 2 of Subsidies/ Countervailing Measure Code, at p. 59.

49/ UNCTAD secretariat: Dominant positions of market power of transnational corporations/Use of the transfer pricing mechanism, United Nations Conference on Trade and Development, New York, 1978.

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